

## Ethics rules may change when you cross state lines

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Many lawyers licensed to practice in Minnesota also are licensed in Wisconsin. But differences between the laws and procedures of the two states must be mastered in order to practice in both states effectively.

Just as differences may exist in substantive or procedural law, there are also differences between the professional responsibility rules of Minnesota and Wisconsin – differences that occasionally are important in resolving a professional responsibility dilemma.

### **Different approaches**

One of the most significant differences between the ethics rules of these two states is in their respective approach to client confidentiality under each state's version of Rule 1.6. A large part of this difference has been a result of the fact that Minnesota has a unique rule concerning client confidentiality.

In 1985, when the Minnesota Supreme Court adopted the then-new American Bar Association (ABA) Model Rules of Professional Conduct to replace the former Code of Professional Responsibility, it did not accept the proposed Rule 1.6. Instead, the court essentially retained the former DR 4-101 from the otherwise-repealed code.

Wisconsin, on the other hand, did change to the ABA's Rule 1.6 when it adopted the Model Rules. Since then, each state has amended its confidentiality rule, making each even more unique.

For example, Minnesota still uses the terms "confidences" and "secrets" in its Rule 1.6, and defines these terms. Wisconsin, however, uses the phrase "information relating to representation of a client," which is contained in the ABA's Model Rule 1.6, and which is somewhat broader in its protection than Minnesota's standard.

If the Minnesota Supreme Court adopts the Minnesota State Bar Association's (MSBA) petition for changes to the rules of professional conduct, Minnesota will adopt the ABA definition as well, so this distinction may not exist much longer.[Ftn 1](#)

### **Different obligations**

A more fundamental difference exists in how the two states treat an attorney's obligation when the attorney has information that a client intends to commit a criminal or fraudulent act.

In Minnesota, an attorney has discretion, but not an obligation, to disclose confidential information that a client intends to commit a crime and information necessary to prevent a crime<sup>Ftn 2</sup> Minnesota's confidentiality rule generally does not allow disclosure of the client's intention to commit a fraudulent act.

Wisconsin's rule differs. In Wisconsin, an attorney shall reveal confidential information "to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interests or property of another."

Wisconsin is one of only four U.S. jurisdictions to mandate such disclosures. (The other states are Florida, New Jersey and Virginia.) Even with the adoption of a new Rule 1.6 in Minnesota, this distinction will remain.

So what does an attorney licensed in both states do if she learns confidential information that her client intends to commit a fraud that will cause financial harm? The two states' rules are completely opposite from each other. Must she disclose or is she prohibited from disclosing? Which rule applies?

Ironically, Minnesota and Wisconsin also have differing choice-of-law ethics rules. In Minnesota's current rules choice of law is mentioned only in the unofficial comment to rule 8.5: "Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation." This statement would not instantly help an attorney with an ethics dilemma.

Wisconsin's Rule 8.5 differentiates depending on whether the conduct was in connection with a court proceeding or not. If in connection with a court action, then the rules of the state where the court sits apply; otherwise, the rules of the state where the lawyer principally practices are used – unless the conduct clearly has its predominant effect in the other state, in which case that state's rules will apply.

The MSBA petition to the Supreme Court will create a new Minnesota choice-of-law rule similar to Wisconsin's, so there will be fewer differences between the two border states.

In addition to Wisconsin's Rules 1.6 and 8.5, as discussed here, some other differences exist between the two states concerning their ethics rules. Minnesota attorneys licensed in border states like Iowa, North Dakota and South Dakota, or any other jurisdiction, should review those states' ethics rules for any differences.

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[1] One of the reasons expressed for adopting new rules in Minnesota is to make Minnesota's professional responsibility rules more uniform with the rules in other states, many of which have adopted the ABA Model Rules of Professional Conduct.

<sup>2</sup> Rule 1.6(b)(3), Minnesota Rules of Professional Conduct (MRPC). Both states permit, but do not require, attorneys to disclose confidential information necessary to rectify the consequences of a criminal or fraudulent act of the client in furtherance of which the attorney's services have already been used. Rule 1.6(b)(4), MRPC. Only last month the ABA House of Delegates passed an amendment to the Model Rule that will generally parallel Minnesota and Wisconsin's rule on this point.